A **JET-TECH MATERIALS SDN BHD & ANOR**

v.

YUSHIRO CHEMICAL INDUSTRY CO LTD & ORS AND ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
C ZALEHA ZAHARI FCJ
SULONG MATJERAIE FCJ
[CIVIL APPEALS NO: 02-32-2011(W) & 02-33-2011(W)]
16 JANUARY 2013

D ***COMPANY LAW:*** *Members' rights - Oppression - Petition under s. 181 Companies Act 1965 - Interpretation given to words 'just and equitable' in Ebrahimi v Westbourne Galleries Ltd - Whether applicable to interpretation of oppression provision in s. 181 Companies Act 1965 - Whether respondents acted in manner oppressive to appellants - Whether*
E *interests of appellants prejudiced - Complaints related to agreement between shareholders and not in relation to conduct and management of company - Whether fell within ambit of s. 181 Companies Act 1965 - Whether breach by majority shareholder of shareholders' agreement amounted to oppressive conduct within meaning of s. 181 Companies Act 1965*

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There were two appeals herein, namely Civil Appeal No. 02-32-2011 (W) ('the first appeal') and Civil Appeal No. 02-33-2011(W) ('the second appeal'), which were against the decision of the Court of Appeal in allowing the respondents' appeal and thus
G setting aside the decision of the High Court. The appellants in both appeals were Jet-Tech Materials Sdn Bhd ('Jet-Tech') and Chen Siew Man ('Chen'). The respondents in the first appeal were Yushiro Chemical Industry ('Yushiro'), Ota Aisaku ('Ota') and Sakurai Hiroki ('Sakurai'). In the second appeal, the
H respondents were Gan Lai Ban ('Gan') and Firdaos Azhar ('Firdaos'). Both appeals revolved around a dispute between the shareholders of a company, Yushiro-Jet Chemicals Sdn Bhd ('the company'). The original shareholders of the company were Chen, his wife one Soo Yoke Yew ('Soo') and Gan. On 29 August
I 1996, the shareholders of the company entered into a shareholders agreement with Yushiro, Jet-Tech and Firdaos. Concurrently a license and technical assistance agreement was entered into by the company with Yushiro. The objective of the two agreements was to facilitate the participation of the parties in

the manufacturing and sale of a fluid used for lubrication ('the product'). Accordingly, the company set up a plant to manufacture the product in Malaysia. Due to the company's success, Chen and Yushiro considered it feasible to set up a separate company in Thailand. A company known initially as Jet Thai ('Jet Thai') and later Yushiro Thailand Chemical Pte Ltd ('YTC') was incorporated to take the lead in the manufacturing activities in Thailand. On 8 October 2003, Yushiro bought a further 500,000 new shares which resulted in Yushiro becoming the majority shareholder, which was the subject of an intense factual dispute between the appellants and the respondents. The appellants filed a s. 181 petition against Yushiro, Gan and Firdaos. The appellants contended that Yushiro as the majority shareholder in the company had conducted itself in an oppressive manner by, *inter alia*, deceitfully taking over the majority shares in the company and using its majority shares to remove Chen as a director of the company contrary to the shareholders' agreement. The High Court decided in favour of the appellants and ordered Yushiro to pay Jet-Tech a sum of RM3,610,698 as compensation for loss of controlling interest in the company by the allotment of 500,000 shares in the company to Yushiro. The Court of Appeal, however, unanimously allowed the respondents' appeal with costs and set aside the decision of the High Court. It was the Court of Appeal's view, *inter alia*, that the trial judge, having made a finding that acts of oppression had taken place, had failed to give his grounds in arriving at such finding. The Court of Appeal also held that the complaints by the appellants did not fall within the ambit of s. 181 of the Companies Act 1965 ('CA') as the complaints were related to the agreement between the shareholders and not in relation to the conduct and management of the affairs of the company. Leave to appeal was granted by this court and the questions framed for determination herein were, *inter alia*, (i) whether the interpretation given to the words 'just and equitable' in *Ebrahimi v. Westbourne Galleries Ltd* and by the Privy Council in *Tay Bok Choo v. Tahansan Sdn Bhd* in the winding up provision of s. 218(1) of the Companies Act 1965 with respect to a quasi partnership company applied to the interpretation of the oppression provision in s. 181 of the Companies Act 1965; (ii) whether the respondents had acted in a manner oppressive to or disregard of or otherwise prejudicial to the interests of the appellants; and (iii) whether a breach by a majority shareholder of a written shareholder agreement would amount to 'oppressive conduct' or be 'otherwise prejudicial' to a minority shareholder within the meaning of s. 181(1)(a) or (b), thereby entitling a court to grant relief pursuant to s. 181(2).

Held (dismissing both appeals with costs)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The interpretation of the words 'just and equitable' by the House of Lords in *Ebrahimi* and the Privy Council in *Tahansan* in the winding up provision of s. 218 of the CA with respect to a quasi partnership company is applicable to the interpretation of the oppression provision in s. 181 of the CA, thus answering the first question in the affirmative. (para 42)

(2) The trial judge had failed to give his grounds on the issue of oppression, thus appellate intervention by the Court of Appeal was justified. The Court of Appeal had dealt at length with the alleged acts of oppression complained of by the appellants. The decision of the directors to proceed with the investment in Jet-Thai, *albeit* at a diluted shareholding, could not be a basis of a petition under s.181 of the CA and could not be regarded as 'cheating' Jet Tech of its majority position. It was a commercial decision made after due deliberation by the directors, including Chen. (para 36)

(3) Breaches of a shareholders' agreement could not be a basis for bringing a petition under s. 181. A complaint under s.181 of the CA must be confined to matters relating to the affairs of the company. Shareholders' agreement and breach of the same clearly were not matters relating to the affairs of the company. These were private matters enforceable by the parties to the shareholders' agreement. In any event, Yushiro's request to Chen to retire as a director of the company did not fall within the scope of s. 181 of the CA. This complaint was confined to the status of Chen as a managing director, not as a shareholder of the company. Such request could not be termed as 'oppression' within the meaning of s. 181 of the CA. (para 37)

(4) Based on the facts and circumstances of the present appeal herein, there was no oppressive conduct on the part of the respondents as the appellants had by way of a written resolution agreed to Yushiro subscribing to the shares of the company and becoming the majority shareholder. The Court of Appeal had made the correct findings based on the facts, law and evidence in arriving at the decision which they did. As such, the second and third questions were answered in the negative. (para 42)

Bahasa Malaysia *Translation Of Headnotes*

Terdapat dua rayuan dalam kes ini, iaitu Rayuan Sivil No. 02-32-2011 (W) ('rayuan pertama') dan Rayuan Sivil No. 02-33-2011 (W) ('rayuan kedua'), yang menentang keputusan Mahkamah Rayuan yang membenarkan rayuan responden-responden dan telah mengetepikan keputusan Mahkamah Tinggi. Perayu-perayu dalam kedua-dua rayuan adalah Jet-Tech Materials Sdn Bhd ('Jet-Tech') dan Chen Siew Man ('Chen'). Responden-responden dalam rayuan pertama adalah Yushiro Chemical Industry ('Yushiro'), Ota Aisaku ('Ota') dan Sakurai Hiroki ('Sakurai'). Dalam rayuan kedua, responden-responden adalah Gan Lai Ban ('Gan') dan Firdaos Azhar ('Firdaos'). Kedua-dua rayuan berkisarkan pertikaian antara pemegang-pemegang saham syarikat, Yushiro-Jet Chemicals Sdn Bhd ('syarikat'). Pemegang-pemegang saham asli syarikat adalah Chen, isterinya satu Soo Yoke Yew ('Soo') dan Gan. Pada 29 Ogos 1996, pemegang-pemegang saham syarikat telah memasuki satu perjanjian pemegang-pemegang saham dengan Yushiro, Jet-Tech dan Firdaos. Pada masa yang sama, satu perjanjian lesen dan bantuan teknikal telah dimasuki oleh syarikat dengan Yushiro. Tujuan kedua-dua persetujuan tersebut adalah untuk memudahkan penyertaan pihak-pihak terlibat dalam pembuatan dan penjualan bendalir yang digunakan sebagai pelincir ('produk'). Syarikat seterusnya menubuhkan sebuah kilang untuk membuat produk tersebut di Malaysia. Disebabkan kejayaan syarikat, Chen dan Yushiro mendirikan syarikat yang berasingan di Thailand. Satu syarikat yang pada mulanya dikenali sebagai Jet Thai ('Jet Thai') dan kemudiannya Yushiro Thailand Chemical Pte Ltd ('YTC') ditubuhkan untuk menerajui aktiviti-aktiviti pembuatan di Thailand. Pada 8 Oktober 2003, Yushiro membeli 500,000 saham baru menjadikan Yushiro pemegang saham majoriti, yang menjadi subjek pertikaian antara perayu-perayu dan responden-responden. Perayu-perayu memfailkan petisyen s. 181 terhadap Yushiro, Gan dan Firdaos. Perayu menghujahkan bahawa Yushiro sebagai pemegang saham majoriti dalam syarikat telah melakukan penindasan dengan, antara lain, secara penipuan mengambil alih saham-saham majoriti dalam syarikat dan telah menggunakan saham-saham majoriti itu untuk membuang Chen sebagai pengarah syarikat bertentangan dengan perjanjian pemegang-pemegang saham. Mahkamah Tinggi telah memutuskan bagi pihak perayu-perayu dan memerintahkan Yushiro membayar Jet-Tech amaun RM3,610,698 sebagai pampasan kehilangan kawalan kepentingan dalam syarikat dengan pengumpukan 500,000 saham-saham dalam syarikat kepada

Yushiro. Mahkamah Rayuan, walau bagaimanapun, telah sebulat suara membenarkan rayuan responden-responden dengan kos serta mengetepikan keputusan Mahkamah Tinggi. Mahkamah Rayuan berpandangan, antara lain, bahawa hakim bicara, setelah membuat penemuan bahawa terdapat tindakan-tindakan penindasan, telah gagal memberikan alasan-alasan bagaimana ia telah membuat dapatan tersebut. Mahkamah Rayuan juga memutuskan bahawa aduan-aduan yang dibuat oleh perayu-perayu tidak terjumlah dalam lingkungan s. 181 Akta Syarikat 1965 ('AS') kerana aduan-aduan berhubungan dengan persetujuan antara pemegang-pemegang saham dan tiada kaitan dengan tingkah laku dan pengurusan hal ehwal syarikat. Kebenaran membuat rayuan telah diberikan oleh mahkamah ini dan soalan-soalan yang timbul adalah, antara lain, (i) sama ada tafsiran yang diberikan kepada perkataan 'just and equitable' dalam *Ebrahimi v. Westbourne Galleries Ltd* dan oleh Majlis Privi di *Tay Bok Choo v Tahansan Sdn Bhd* dalam peruntukan penggulungan s. 218(1) Akta Syarikat 1965 berkenaan dengan perkongsian kuasi tergunapakai kepada tafsiran peruntukan penindasan di s. 181 Akta Syarikat 1965; (ii) sama ada responden-responden telah bertindak dengan cara yang menindas ke atas atau tidak mengambilkira atau telah memprejudiskan kepentingan-kepentingan perayu-perayu; dan (iii) sama ada perlanggaran perjanjian pemegang-pemegang saham oleh pemegang saham majoriti adalah 'kelakuan menindas' atau selainnya 'memudaratkan' pemegang saham minoriti dalam maksud s. 181(1)(a) atau (b), sekali gus melayakkan mahkamah memberikan relif di bawah s. 181(2).

Diputuskan (menolak kedua-dua rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Tafsiran perkataan-perkataan 'just and equitable' di dalam peruntukan penggulungan s. 218 AS yang menyentuhi syarikat separa perkongsian oleh House of Lords dalam *Ebrahimi* dan Majlis Privi dalam *Tahansan* adalah terpakai kepada tafsiran peruntukan penindasan s. 181 AS. Oleh itu soalan pertama ini dijawab secara afirmatif.

(2) Hakim bicara telah gagal memberi alasan-alasannya mengenai isu penindasan. Oleh itu campur tangan Mahkamah Rayuan adalah wajar. Mahkamah Rayuan telah menangani isu tindakan-tindakan penindasan yang didakwa oleh perayu-perayu dengan panjang lebar. Keputusan pengarah-pengarah untuk meneruskan pelaburannya di Jet-Thai, walaupun pada

pegangan saham dicairkan, tidak boleh menjadi dasar petisyen di bawah s. 181 AS dan tidak boleh dianggap seperti 'menipu' Jet-Tech dari kedudukan majoritinya. Ia adalah keputusan komersil yang dibuat selepas perbincangan dengan pengarah-pengarah, termasuk Chen.

(3) Pelanggaran perjanjian pemegang-pemegang saham tidak boleh menjadi dasar membawa petisyen di bawah s. 181. Satu aduan di bawah s. 181 AS harus terhad kepada perkara-perkara berhubung hal ehwal syarikat. Perjanjian pemegang-pemegang saham dan pelanggarannya dengan jelas bukanlah perkara-perkara berhubung hal ehwal syarikat. Ini adalah perkara-perkara sulit dikuatkuasakan oleh pihak-pihak kepada perjanjian pemegang-pemegang saham. Dalam apa jua keadaan, permintaan Yushiro kepada Chen untuk bersara sebagai pengarah syarikat tidak termasuk dalam skop s. 181 AS. Aduan ini hanya terhad kepada status Chen sebagai pengarah urusan, bukan sebagai pemegang saham syarikat. Permintaan sebegitu tidak boleh diistilahkan sebagai penindasan dalam maksud s. 181 AS.

(4) Berdasarkan fakta-fakta dan keadaan rayuan ini, tiada tindakan menindas dari pihak responden-responden kerana perayu-perayu melalui resolusi bertulis, bersetuju Yushiro melanggan saham-saham syarikat dan menjadi pemegang saham majoriti. Mahkamah Rayuan telah membuat dapatan yang betul berdasarkan fakta-fakta, undang-undang dan keterangan dalam membuat keputusan tersebut. Oleh itu, soalan kedua dan ketiga dijawab secara negatif.

Case(s) referred to:

Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors [1999] 7 CLJ 1 HC ***(refd)***

Chang Shu Hua (P) v. Goon Fook Hong [2008] 2 CLJ 359 CA ***(refd)***

Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd [1972] 2 All ER 492 ***(refd)***

O'Neill v. Phillips [1999] 2 All ER 961 ***(refd)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Re Westbourne Galleries [1973] AC 360 ***(refd)***

Russel v. Northern Bank Development Corp Ltd [1992] BCLC 1016 ***(refd)***

Soh Jiun Jen v. Advance Colour Laboratory Sdn Bhd & Ors [2010] 4 CLJ 897 CA ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & 5 Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181(1)(a), (b), (2), 218(1)(i)

Companies Act 1948 [UK], ss. 184, 210, 218, 222(f), 459, 461

(Civil Appeal No: 02-32-2011(W))

For the appellants - Tommy Thomas (Datuk Jagjit Singh, Jasbeer Singh, Navamalar Ganesan & V Jeya Kumar with him); M/s Jasbeer, Nur & Lee

For the respondents - Dhinesh Bhaskaran (Sheila Lingam & Aarthi Jeyarajah with him); M/s Shearn Dellamore & Co

(Civil Appeal No: 02-33-2011(W))

For the appellants - Tommy Thomas (Datuk Jagjit Singh, Jasbeer Singh, Navamalar Ganesan & V Jeya Kumar with him); M/s Jasbeer, Nur & Lee

For the respondents - Azhar Azizan Harun (Abdullah Abd Rahman with him); M/s Cheang & Ariff

[Appeal from Court of Appeal; Civil Appeals No: W-02-1432-2010 & W-02-1433-2010]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] There are two appeals before us namely Civil Appeal No. 02-32-2011(W) ("1st appeal") and Civil Appeal No. 02-33-2011(W) ("2nd appeal"). Both appeals are against the decision of the Court of Appeal dated 18 January 2011 allowing the respondents' appeal and thus setting aside the decisions of the High Court dated 13 April 2010. The High Court had allowed the appellants' petition under s. 181 of the Companies Act 1965 ("CA") and had granted the appropriate relief thereunder to the appellants.

[2] The appellants in both appeals are Jet-Tech Materials Sdn Bhd ("Jet-Tech") and Chen Siew Man ("Chen"). The respondents in the 1st appeal are Yushiro Chemical Industry Co Ltd ("Yushiro"), Ota Aisaku ("Ota") and Sakurai Hiroki ("Sakurai"). In the 2nd appeal the respondents are Gan Lai Ban ("Gan") and Firdaos bin Azhar ("Firdaos").

[3] Leave to appeal was granted by this court on 5 May 2011 and the questions framed for our determination in these appeals are:

Question 1

Whether the interpretation given to the words "just and equitable" by the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492 and by the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 in the winding-up provision of the Companies Act 1965, *viz* s. 218(1) with respect to a quasi partnership company apply to the interpretation of the oppression provision in the Companies Act 1965 *viz* s. 181.

Question 2

Whether the respondents acted in a manner oppressive to or disregard of or otherwise prejudicial to the interests of the appellants within the meaning of s. 181(1).

Question 3

Whether a breach by a majority shareholder of a written shareholder agreement would amount to "oppressive conduct" or be "otherwise prejudicial" to a minority shareholder within the meaning of s. 181(1)(a) or (b), thereby entitling a court to grant relief pursuant to s. 181(2).

Question 4

Whether the expressions "affairs of the company" under s. 181(1)(a) or "some act of the company" under s. 181(1)(b) should, to reflect Parliament's intention, be given the widest import, having regard to the infinite or unlimited circumstances under which companies carry on business and/or manage their affairs.

Question 5

Whether it is open to a majority shareholder who has no objection to the most extreme or drastic remedy provided in s. 181(2), namely, an order that the company in question be wound-up, being granted by the court, to object to the court granting a remedy of lesser gravity, *vis*, and order that the majority shareholder purchases the shares of a minority shareholder.

Background Facts

[4] Both appeals revolve around a dispute between the shareholders of a company known as Yushiro-Jet Chemicals Sdn Bhd ("the company"). The background facts leading to the dispute in this case are these.

[5] The company, formerly known as Jet Chemical Sdn Bhd, was incorporated by Chen on 27 December 1990. It started as a trading company to market in Malaysia a blended chemical cutting fluid used for lubrication and heat remover ("the product"). The product was manufactured by Yushiro in Japan and the company was its authorised distributor.

[6] The original shareholders of the company were Chen and his wife, one Soo Yoke Yew ("Soo"). Gan subsequently became a shareholder of the company and held 25% of the shares consequence upon which the holding of the respective shareholders was as follows:

Chen	-	51.5%
Gan	-	25%
Soo	-	23.5%

[7] On 29 August 1996, the shareholders of the company entered into a shareholders agreement with Yushiro, Jet-Tech and Firdaos. By the shareholders agreement, the original shareholders of the company agreed to sell their shares to Yushiro, Jet-Tech and Firdaos. Jet-Tech was the alter ego of Chen. Concurrently a license and technical assistance agreement was entered into by the company with Yushiro.

[8] The objective of the two agreements was to facilitate the participation of the parties in the manufacturing and sale of the product for which Yushiro had the necessary technical data, experience and information. Accordingly, the company decided to

set up a plant to manufacture the product in Malaysia. To facilitate the new investment, the paid up capital of the company was increased to RM1 million.

[9] As a result of the shareholders agreement together with the increase of the paid up capital, the holding of the respective shareholders of the company was as follows:

Shareholders	Number of Shares	Percentage
Jet-Tech	435,000	43.5%
Firdaos	300,000	30%
Yushiro	265,000	26.5%
Total	1,000,000	100%

[10] The shareholders agreement provided that Jet-Tech could nominate three directors of the company, and Yushiro could nominate one director. Jet-Tech nominated Chen, Firdaos and Gan, while Yushiro nominated Ota. The company thenceforth was managed by the following board of directors:

Chen - Managing Director
Firdaos - Executive Director
Gan - Director
Ota - Director

[11] The manufacturing plant that was set up in Malaysia proved to be successful and did very well. The product manufactured in Malaysia were marketed to Thailand, Singapore, Philippines, Indonesia, Vietnam and India. Due to the company's success in Thailand, Chen and Yushiro considered it feasible to set up a separate company in Thailand. A company known initially as Jet Thai and later to Yushiro Thailand Chemical Pte Ltd ("YTC") was incorporated to take the lead in the manufacturing activities in Thailand.

[12] On 8 October 2003, Yushiro bought a further 500,000 new shares for RM2,500,000 which was paid to the company and the shareholding of the respective shareholders of the company was then as follows:

Yushiro - 51%
Jet-Tech - 29%
Gan - 13.33%
Firdaos - 6.67%

The purchase of 500,000 of the aforesaid shares by Yushiro resulted in Yushiro becoming the majority shareholder and was the subject of an intense factual dispute between the appellants and the respondents in the High Court. This resulted in 37 affidavits (running into more than 700 pages and with numerous exhibits) being exchanged between the parties.

The Petition

[13] The appellants filed a s. 181 petition against Yushiro, Gan and Firdaos in December 2004. The petition was subsequently amended. The decision of the High Court on the amended petition (encl. 90) was the subject matter of appeal before the Court of Appeal. Briefly, the appellants contended that Yushiro as the majority shareholder in the company had conducted himself in an oppressive manner by:

(a) deceitfully taking over the majority shares in the company on 8 October 2003 by promising orally to have the company as the lead company to manufacture and sell the product in Thailand and that Yushiro would only invest through the company and not directly, but thereafter proposing an investment plan whereby Yushiro would by-pass the company and invest substantially directly by itself in the new company to be incorporated in Thailand;

(b) deciding to allot only 16% in the company in Thailand contrary to the promise to appoint the company as the lead company in Thailand;

(c) using its majority shares in the company in an attempt to remove Chen as a director of the company contrary to the shareholders' agreement;

(d) refusing to allow Jet-Tech and Chen to remove their nominees (Gan and Firdaos) from the Board of Director of the company contrary to cl. 4(1) of the shareholders' agreement; and

(e) using its majority shares in the company to effectively appoint Ota, Sakurai, Can and Firdaos totalling four directors to the Board of Director of the company on behalf of Yushiro, contrary to the terms of the shareholders' agreement.

[14] Thus, the appellants prayed, *inter alia*, for the following orders: A

(a) requiring Yushiro to buy the shares of Jet-Tech in the company "at the fair value on a willing seller willing buyer basis on the date of filing this petition"; B

(b) requiring Yushiro to compensate the appellants for their loss of controlling interest in the company, or alternatively, that the allotment of 500,000 shares to Yushiro resulting in Yushiro holding 51% of the company's paid up capital be declared void; C

(c) requiring Gan and Firdaos to deliver the share certificates for 200,000 and 100,000 shares respectively in the company to the appellants; D

(d) restraining the respondents from disbursing money to Thailand without Chen's written agreement;

(e) restraining Yushiro from removing Chen as a director of the company and from designating more than one director to the company's Board of Directors. E

Decision Of The High Court

[15] The learned High Court Judge decided in favour of the appellants and held as follows: F

> that there was clear oppressive conduct by the respondents. To order the company to be wound up, as the respondents wanted, would not be fair and equitable to the petitioners as the value of the shares would have dropped after the presentation of the petition and at the same time the respondents would have G benefited from their oppressive conduct as the field would be left wide open for them to carry on a lucrative business in Thailand without compensating the petitioners adequately. Furthermore, the petitioners became minority shareholders as a result of the oppressive conduct and shares of the minority would be lower in H value as the holders thereof could not have a controlling interest in the company.

[16] In essence the learned High Court Judge found that the appellants had established their case under s. 181, including Chen who had the necessary *locus* by virtue of his shareholding in Jet- I Tech. The High Court then ordered Yushiro to purchase 735,000 ordinary shares in the company from Jet-Tech at a costs of RM8,200,165 as assessed by a qualified actuarist, with payment

to be effected by the parties within sixty days from the date of the judgment. For that purpose, Gan and Firdaos were ordered to deliver to Jet-Tech share certificates registered in their respective names in the company.

[17] Yushiro was also ordered to pay Jet-Tech a sum of RM3,610,698 as compensation for loss of controlling interest in the company by the allotment of 500,000 shares in the company to Yushiro.

[18] Interest at 8% per annum was ordered to be paid on the two sums until final settlement.

Decision Of The Court Of Appeal

[19] The Court of Appeal unanimously allowed the respondents' appeal with costs and set aside the decision of the High Court. The Court of Appeal, after carefully perusing the grounds of judgment of the learned High Court Judge, was unable to find the basis for the orders made in this case. The Court of Appeal held:

> We are mindful of the limits of the powers of an appellate court to interfere with a finding of fact by a trial court. However, in this case, where the trial judge had made a finding that acts of oppression had taken place but had failed to give its grounds for such finding, appellate intervention is certainly warranted.
>
> Subsection 181(2) of the CA is very clear. It is only upon either of the grounds set out in paragraph (a) and (b) in subsection 181(1) being found by the Court to have been established that the Court has the power to make the orders necessary with the view to bringing to an end or remedying the matters complained of.
>
> It is not open to the High Court to make the orders if neither of the grounds is found to have been established. Where there is no wrong, there cannot be a remedy.

[20] At the outset the Court of Appeal was of the considered view that Chen, lacked the necessary *locus standi* to seek a remedy under s. 181 of the CA. In this regard the Court of Appeal was of the view that a person who claims to have a beneficial interest in the shares of a company through a registered member, does not have the *locus standi* to present a petition under s. 181 of the CA. (The Federal Court case of *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130 was referred as the authority to this proposition).

[21] Further, the Court of Appeal was of the view that the complaints by the appellants, even if made out, did not fall within the ambit of s. 181 of the CA as the complaints relates to the agreement between the shareholders and not in relation to the conduct and management of the affairs of the company. The Court of Appeal further held that the events leading to Yushiro becoming the majority shareholder in the company could not amount to oppression since Chen had agreed to the increase in the issued and paid-up capital of the company in favour of Yushiro at which point in time Chen was the majority shareholder of the company and was in control of the Board of Directors of the company.

Issues and Findings

[22] As stated earlier, the first question of law which was allowed by this court was whether the interpretation of the words 'just and equitable' by the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492 ("*Ebrahimi*") and the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 ("*Tahansan*") in the winding-up provision of the CA under s. 218 with respect to a quasi partnership company was applicable to the interpretation of oppression under s. 181(1) of the CA.

[23] Under s. 218(1) of the CA, the court has the discretion to wind-up a company when it is just and equitable to do so. The leading case on what constitutes 'just and equitable' is *Ebrahimi* and the facts are as follows. Two partners, N and E, carried on the business of selling carpets through a company. Each owned 50% of the share capital (500 shares each) and were the only directors. G, the son of N, was subsequently appointed as a director, with both N and E transferring 100 shares each to G. This meant that both father and son controlled the management through the Board of Directors on a 2:1 vote, the general meetings of members by the majority of 600 to 400 votes. At a general meeting of the company, by means of an ordinary resolution, which was legally effective under s. 184 of the UK Companies Act 1948 and the company's articles of association, they removed E from the office of director, and thereafter excluded him from any role in the conduct of the company's businesses.

[24] E's application for a winding-up order against the company under s. 222(f) of the UK Companies Act 1948 (equivalent to our s. 218(1)(i) of our CA) was allowed by the High Court and affirmed by the House of Lords. Lord Wilberforce in justifying the application of "just and equitable" clause to the facts of that case held:

> The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right on the company in general meeting whatever the articles may say. Some articles may prescribe other methods, for example a governing director may have the power to remove (cf *Re Wondoflex Textiles Pty Ltd*). And quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director/member may find himself no longer a director, through removal, or non re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or *mala fides*. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by courts in partnership cases where there has been exclusion from management (see *Const v. Harris*) even where under the partnership agreement there is a power of expulsion (see *Blisset v. Daniel and Lindley* on partnership).

[25] In *Re Westbourne Galleries* [1973] AC 360, Lord Wilberforce, at p. 379, pointed out that the words "just and equitable":

> ... are recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest entitle one party to disregard the obligation he assumes by entering a company, nor the court

to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[26] Since this court has been invited to follow the footsteps of the English Courts, it is imperative at the outset to compare the legislative provisions of both countries at the time *Ebrahimi* was decided. We now produce the relevant provisions of the two Acts:

Section 181 Malaysia's Companies Act 1965	Section 210 UK Companies Act 1948
181. Remedy in cases of an oppression. (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground: (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members of holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).	210. Alternative remedy to winding up in cases of oppression. (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section. (2) If on any such petition the court is of opinion - (a) that the company's affairs are being conducted as aforesaid; and (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself.

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to paragraph (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order, but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fourteen days after the making thereof, be delivered by the company to the registrar of companies for registration; and if a company makes default in complying with this

provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order, but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company. (5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order. Penalty: One thousand ringgit. Default penalty.	subsection, the company and every office of the company who is in default shall be liable to a default fine. (5) In relation to a petition under this section, section three hundred and sixty-five of this Act shall apply as it applies in relation to a winding-up petition, and proceedings under this section shall, for the purposes of art V of the Economy (Miscellaneous Provisions) Act, 1926, be deemed to be proceedings under this Act in relation to the winding up of companies.
Section 218 Malaysia's Companies Act 1965	Section 222 UK Companies Act 1948
218. Circumstances in which company may be wound up by Court. (1) The Court may order the winding up if - (a) the company has by special resolution resolved that it be wound up by the Court; (b) default is made by the company in lodging the statutory report or in holding the statutory meeting; (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year; (d) the number of members is reduced in the case	A company may be wound by the court if - (a) the company has by special resolution resolved that the company be wound up by the court; (b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting; (c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year; (d) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;

of a company (other than a company the whole of the issued shares in which are held by a holding company) below two; (e) the company is(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members; (g) an inspector appointed under Part IX has reported that he is of opinion: Unable to pay its debts; (i) that the company cannot pay its debts and should be wound up; or (ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up; (h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires of the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved; (i) the Court is of opinion that it is just and equitable that the company be wound up.	(e) the company is unable to pay its debts; (f) the court is of opinion that it is just and equitable that the company should be wound up.

[27] A careful look at the provisions of s. 181 of the Malaysian CA and s. 210 of the UK Companies Act will show that both provisions are differently worded. This difference was rightly pointed out by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170, when delivering the advice of Privy Council said:

> This section can trace its descent from s. 210 of the United Kingdom Companies Act 1948, which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s. 186 of the Australian Companies Act 1951. But s. 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd* [1959] 1 WLR 62 at p 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding up of the company.
>
> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind-up the company would unfairly prejudice the 'oppressed' ... The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of "oppression" or "disregard" and then leaves to the court a wide discretion as to the relief which it may grant, including the options that of winding the company up. That options ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of s. 210, but is not the case under s. 181.

[28] Based on the case cited above, it could be said that s. 210 of the UK Companies Act 1948 is totally different from s. 181 of the Malaysian CA. Section 210 of the UK Companies Act laid down the requisite "just and equitable" being the condition that has to be fulfilled before a company could be wound up unlike s. 181 of the Malaysian CA where the words "just and equitable" does not appear. Therefore, at this stage we are of the opinion

A that the case of *Ebrahimi* does not allow Malaysian Court to import the concept of "just and equitable" under s. 218 of the UK Companies Act 1948 as a ground for winding up under s. 181 of the Malaysian CA.

B **[29]** However, it must be stressed that *Ebrahimi* was decided under the UK Companies Act 1948, a statute that was repealed by the UK Companies Act 1985. An action for oppression of the minority shareholders has now been provided for under s. 459 of the UK Companies Act 1985 and the remedy spelt out in s. 461 C as follows:

> (1) A member of a company may apply to the court by Order on petition for an order under this Part on the ground that the application of company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the D interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
>
> (2) The provisions of this Part apply to a person who is not a E member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly

F The English Courts had an opportunity to examine s. 459 of the UK Companies Act 1985 in the case of *O'Neill v. Phillips* [1999] 2 All ER 961 ("*O'Neil*"). The House of Lords in *O'Neill* stressed that there must be some breach of equitable principle or an G agreement before a breach of a member's legitimate expectation may give rise to a remedy for oppression. The House of Lords had also imported the "just and equitable" principles as enunciated in *Ebrahimi* into the oppression provision of the UK Companies Act 1985. Lord Hoffmann in the course of discussing H the phrase "unfairly prejudicial" found in s. 461 of the UK Companies Act 1985 concluded that the concept of unfairness in s. 459 was parallel to the concept of "just and equitable" as propounded in *Ebrahimi*. Lord Hoffman said:

> I In Section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at pages 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *Re J E Cade & Sons Ltd* [1992] BCLC 213 at 227 : 'The court ... has a very wide discretion, but it does not sit under a palm tree'

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ....

... So the context and background are very important.

His approach to the concept of unfairness in Section 459 runs parallel to that which your Lordships' House, in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360, adopted in giving content to the concept of 'just and equitable' as a ground for winding up.

I would apply the same reasoning to the concept of unfairness in Section 459.

I should make it clear that the parallel I have drawn between the notion of 'just and equitable' as explained by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd* and the notion of fairness in Section 459 does not mean that conduct will not be unfair unless it would have justified an order to wind up the company. There was such a requirement in Section 210 of the Companies Act, 1948 but it was not repeated in Section 459. As Mummery J observed in *Re a company (No. 00314 of 19897), ex parte Estate Acquisition and Development Ltd* [1991] BCLC 154 at 161, the grant of one remedy will not necessarily require proof of conduct which would have justified a different remedy.

Under subsection 459 to 461 the court is not ... faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.

A The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair.

[30] The scope of the oppression petition under s. 181 of the CA was recently discussed by this court in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721, where Richard Malanjum CJ (Sabah & Sarawak) held that:

> Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and must eminently be determined according to the facts of the case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interest, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.
>
> It may also be noted from the wording of s. 181 its basic theme is "unfairness". However unfairness does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given must be based upon rational principles. "The Court...has a very wide discretion, but it does not sit under a palm tree". (See: *O'Neil v. Philips* [1999] All ER 961)

[31] Applying what was stated by Lord Hoffman in *O'Neill* and this court in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngui-Kee Corporation (M) Bhd & Anor* (*supra*), we hold the view that the principle laid down by *Ebrahimi* may be applied to the oppression provision of s. 181 of the CA.

[32] However the question of whether or not it is "just and equitable" to wind up a company is a question of fact. In the instant case, it was submitted on behalf of the appellants that the learned trial judge had made a finding of fact on the issue of oppression, and had exercised his discretion correctly and judicially. The Court of Appeal thus was wrong in reversing the findings of fact of the learned trial judge. In all fairness to the judges of the Court of Appeal, they were clearly aware of the limits of their power to interfere with the findings of fact of a trial judge.

However, in this instant case, the Court of Appeal's findings was that the learned trial judge having made a finding that acts of oppression had taken place had failed to give his grounds in arriving at such finding. The Court of Appeal held:

> We have carefully perused the grounds of judgment of the learned High Court Judge to ascertain the basis for the orders made in this case. Unfortunately, we are unable to find any. The learned High Court Judge had devoted almost the whole of his grounds of judgment to issues of valuation for the purpose of determining the price at which Yushiro was to purchase the shares of Jet-Tech in the Company, and for the purpose of arriving at the amount of compensation to be paid by Yushiro for Jet-Tech's loss of majority control of the Company.

[33] We have read and re-read the grounds of judgment of the learned trial judge, and are in agreement with the Court of Appeal that the learned trial judge had failed to give his grounds on the issue of oppression. Appellate intervention by the Court of Appeal was therefore in this case justified. In fact the Court of Appeal had dealt at length with the alleged acts of oppression complained off by the appellants. We now deal with the said issues.

(i) On The Complaint That Yushiro Had Misrepresented To The Respondents That The Company Would Take The Lead In The Thai Ventures And Decision On Level Of Participation In Jet Thai

[34] In relation to this issue the Court of Appeal said:

> Chen himself admitted in paragraph 14(i) of the Petition that he attended a meeting of the Board of Directors of the Company on 13 April 2004 and finally signed the minutes of the meeting which agreed that the Company would only participate in 30% of the shareholding in Jet Thai. Clearly by this time any contention that the Company would take the lead in the Thai venture no longer had any merit.
>
> Chen stated that he was forced to sign the minutes as the other directors had approved the minutes. We find this difficult to accept. There was no evidence of any force as alleged being exerted.

[35] We have no reason to disagree with the Court of Appeal on this issue. This is especially so when there is no contemporaneous documentary evidence produced by the appellants to show the existence of the promise made on 20 August 2003 that the

company would take the lead in the Thai company. The appellants' evidence of the alleged oral promise only came much later in the form of e-mail. In our considered opinion the appellants' allegation that there was an oral promise by Yushiro that the company would take the lead in the Thai company was an afterthought. In this regard, the Court of Appeal held that:

> That the amount of 20 million baht would only enable the Company to acquire 16% of the interest in Jet-Thai was clearly within Chen's knowledge. The minutes of the meeting of Board of Directors held on 22 October 2004 disclosed that Chen at that meeting proposed that the Company "invest an amount equivalent to 20% of the share capital of Jet Thai to be funded' by a share capital increase of 100,000 shares in the company solely from himself". The Board rejected that proposal. Gan explained the reason in his affidavit in reply. According to him, the Board believed that it was not prudent to invest more than 20 million baht in Jet Thai taking into consideration the Company's financial status and the feasibility of the operations of Jet Thai.
>
> This decision to invest only 20 million baht (which initially translated into 30% but later 16% of the share capital of Jet Thai) in Jet Thai was clearly a management/investment decision. Chen (and by extension Jet-Tech) knew of this and participated in the discussion and did not in fact express any opposition to it.
>
> We are therefore unable to fathom how this decision could be construed as an act of oppression within the meaning of subsection 181(1) of the CA.

[36] We agree with the Court of Appeal. The decision to invest not more than 20 million Baht was a management decision which Chen (and by extension Jet-Tech) had participated. The decision of the directors to proceed with the investment in Jet Thai, *albeit* at a diluted shareholding, cannot be a basis of a petition under s. 181 of the CA and cannot be regarded as 'cheating' Jet-Tech of its majority position. It was a commercial decision made after due deliberation by the directors, including Chen. In any event the factual allegation and circumstances surrounding Yushiro's acquisition of 51% of the company shares were in issue and strongly disputed as evident from the 35 affidavits exchanged between the parties together with exhibits running into thousands of pages. In view of the strongly contested affidavit evidence before the High Court Judge, the learned judge ought to have

disregarded the disputed facts and evidence, and make a decision based solely on the undisputed facts and evidence. (see *Tahansan* (*supra*), *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721, *Chang Shu Hua v. Goon Fook Hong* [2008] 2 CLJ 359). However, from the trial judge's grounds of judgment, it appears that he accepted at face value the appellants' version of events, evidence and arguments without much enquiry.

(ii) The Appointment And Removal Of Gan And Firdaos As Directors Of The Company

[37] It was alleged by the appellants that Yushiro's conduct in refusing to allow Chen to remove Gan and Firdaos as directors of the company amounted to a breach of the shareholders agreement. In this regard we are in agreement with the submission of learned counsel for the respondents that breaches of a shareholders agreement cannot be a basis for bringing a petition under s. 181. A complaint under s. 181 of the CA must be confined to matters relating to the affairs of the company. Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company. They are private matters enforceable by the parties to the shareholders agreement. (see *Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors* [1999] 7 CLJ 1, *Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & 5 Other Appeals* [1996] 1 CLJ 393 and *Russel v. Northern Bank Development Corp Ltd* [1992] BCLC 1016).

(iii) The Removal Of Chen As The Managing Director Of The Company

[38] The relevant question here is whether Chen was removed as the Managing Director of the company? In this regard the Court of Appeal concluded and held that:

> On 21 December 2004, the Petitioners presented this Petition.
>
> It is clear to us that at the point when the Petitions was presented, Chen still remained on the Board of Directors of the Company. It is also quite clear to us that Gan and Firdaos whom Chen claimed to be nominees of his (and therefore tasked with protecting the interest of Jet-Tech, his alter ego, on the Board of Directors of the Company) were still on that Board.

> Clearly therefore the interest of Jet-Tech was still well represented on the Board of Directors of the Company. It could not therefore be said that Jet-Tech, the member (as opposed to Chen, who was not) had been excluded from the management of the Company, even if Chen was no longer on the Board of the Company.
>
> In the circumstances, we are not able to agree with the contention that there had been a deprivation or denial of the legitimate expectation of the rightful Petitioner here (namely Jet-Tech) in the Ebrahimi sense, or in any other sense, to participate in the management of the Company.

We agree with the above view. In any event Yushiro's request to Chen to retire as a director of the company does not fall within the scope of s. 181 of the CA. This complaint is confined to the status of Chen as a Managing Director, not as a shareholder of the company. Such request cannot be termed as "oppression" within the meaning of s. 181 of the CA. In *Soh Jiun Jen v. Advance Colour Laboratory Sdn Bhd & Ors* [2010] 4 CLJ 897 at 907, the Court of Appeal held:

> If the petitioners relies on sub-s (1)(a) of s. 181, there must be shown the element of 'oppression' or 'disregard'. It must involve, at least, an element of lack of probity or fair dealing to a member against his right as member or shareholder. Oppression or disregard of interest of a director of a company clearly does not come under the ambit of s. 181 ...

We endorse the above view.

(iv) Yushiro Becoming A Majority Shareholder

[39] The appellants claimed that Yushiro had caused them to reduce their 73.5% shareholding in the company to 49% through false representation in that the company would be taking lead in the venture in Thailand.

[40] The Court of Appeal in dealing with this issue held that.

> What must never be lost sight of is that Yushiro took up the additional 500,000 shares from the unissued shares of the Company with the blessings of the shareholders. The circular resolution was circulated by the then Board of Directors which included Chen as well as his nominee, Firdaos. Yushiro at that point in time only held 26.5% of the issued share capital of the Company and was in fact the minority shareholder. Yushiro at that point in time had only one representative on the Board of Directors of the Company.

By written resolution of the members of the Company *in lieu* of an extraordinary general meeting (under section 152A of the CA) the members of the Company voted unanimously to allow the Company to increase its issued and paid up capital by issuing 500,000 new ordinary share of RM 1.00 each at RM 5.00 per share and allot them to Yushiro. Chen (as the authorized representative of Jet-Tech), Firdaos and Gan Lai Ban who, according to Chen, were Chen's nominees and held their registered shares in trust for Chen, voted in favor of the resolution.

How then could that act of issuing and allotting the additional 500,000 shares to Yushiro constitute an oppressive act under subsection 181(1) of the CA?

On the facts of the case in the appeal before us, the decision to allow Yushiro to take up 500,000 additional shares in the Company, thus making it the majority (51%) shareholder, was made by a resolution approved by all the shareholders including the Petitioners. When one holds almost 3/4 of the shares of the company and controls the board of directors of the company, it would be preposterous to even suggest that one can be forced to agree to such a resolution.

We are therefore of the view that the learned High Court Judge erred when he stated, in paragraph 23 of his grounds of judgment that "the petitioners became minority shareholders as a result of the oppressive conduct."

[41] We accept the above view expressed by the Court of Appeal and we adopt the same. Based on the facts and circumstances of the present appeal before us, we find that there was no oppressive conduct on the part of the respondents as the appellants had by way of a written resolution agreed to Yushiro subscribing to the shares of the company and becoming the majority shareholder.

Conclusion

[42] In conclusion, in light of our findings as stated above, we are of the view that the interpretation of the words "just and equitable" by the House of Lords in *Ebrahimi* and the Privy Council in *Tahansan* in the winding-up provision of the CA, *viz* s. 218 of the CA with respect to a quasi partnership company is applicable to the interpretation of the oppression provision in the CA *viz* s. 181, thus answering the 1st question in the affirmative.

A However, based on the facts and circumstances of the present appeal, it is clear that the respondents had not committed any oppressive conduct within the meaning of s. 181 of the CA. The Court of Appeal had made the correct findings based on the facts, law and evidence in arriving at the decision, which they did.
B As such we would answer the 2nd and 3rd questions in the negative.

[43] We find it unnecessary to answer the 4th and 5th questions as they are clearly based on assumption of facts and does not
C have any impact on the outcome of this appeal one way or the other.

[44] In these circumstances, we dismiss both appeals with costs.

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